

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARLOS CHINCHA,

Plaintiff,

v.

MANOJKUMAR PATEL,

Defendant.

* Case No. 17-CV-6127 (ILG)

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* Brooklyn, New York

* April 1, 2019

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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE STEVEN L. TISCIONE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

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1 (Proceedings commenced at 10:43 a.m.)

2 THE CLERK: Civil cause for a motion hearing, 17-CV-
3 6172, Chinchu v. Patel.

4 Counsel, please state your appearances for the
5 record.

6 MR. LEON: Louis Leon, from the Law Offices of
7 William Cafaro, on behalf of the plaintiff, Carlos Chinchu.
8 Good morning, Your Honor.

9 MR. MIZRAHI: Jason Mizrahi, from Levin-Epstein &
10 Associates, counsel for the defendant. Good morning, Your
11 Honor.

12 THE COURT: Good morning.

13 All right.

14 MR. LEON: Your Honor, if I may. Louis Leon for the
15 plaintiff.

16 I would like to apologize very sincerely to the
17 court for being late. My understanding -- my office had
18 calendared this conference for much later today. I was
19 actually down the block. As soon as my office let me know I
20 literally ran here, which is why I'm out of breath. I
21 apologize to the court.

22 THE COURT: Please try to make sure that you keep
23 more careful track of the schedule so you're here on time.

24 MR. LEON: Absolutely, Your Honor.

25 THE COURT: All right. So what information is still

1 outstanding?

2 MR. LEON: Would Your Honor mind if I just go
3 chronologically, or at least with the topics, because that
4 might better address it.

5 In the first category of records, or deficient
6 responses, we have where respondents respond to the document
7 requests objecting and stating that pursuant to these
8 objections, but without waiving them, they are providing
9 certain documents even though the rules leave crystal clear
10 that they have indicated whether they're withholding
11 documents.

12 And in those particular responses there are
13 objections to and stating that the following terms are vague
14 and ambiguous. Lunch breaks, personnel files, employees,
15 supervisors, managers, personnel manuals, handbooks, wage
16 statements, et cetera.

17 So we believe not only are those objections in and
18 of themselves baseless but they're in willful non-compliance
19 with the federal rules that indicate that they have to state
20 whether they're withholding documents. So that hasn't been
21 revised yet.

22 THE COURT: Okay. Are you withholding documents?

23 MR. MIZRAHI: We are not, Your Honor.

24 THE COURT: Okay. So just make that clear.

25 MR. LEON: I'm sorry, Your Honor.

1 THE COURT: So just make that clear.

2 MR. LEON: Number two are tax returns.

3 When I spoke to -- I'm sorry. I don't want to
4 butcher your last name, Mr. Mizrahi -- opposing counsel's
5 boss, Josh Levin-Epstein, he indicated to me that despite the
6 fact that they had provided tax returns quarterly for the
7 years 2014 through 2017, that those years were still
8 incomplete. That he was still trying to get me supplemental
9 information.

10 We had also requested 2014 through the present,
11 which would mean 2014 and 2018 and nothing has been provided
12 for those years.

13 So to the extent that tax returns exist for those
14 years, and there's still supplemental information regarding
15 the years that they already provided us records with, we ask
16 that they be provided.

17 One, the \$500,000 threshold issue is being
18 contested. Two, defendants are even contesting that they
19 employed more than one person in a given year.

20 So as a result, we're also seeking any -- I forget
21 what the particular section of the tax returns are called, but
22 where it indicates how much taxes you are remitting to the
23 government on behalf of the plaintiff, or on behalf of the
24 employees, excuse me.

25 There is no such mention in any of the records that

1 we received of taxes being remitted on behalf of my client or
2 anyone else.

3 So we have reason to believe that those documents
4 are either in existence but haven't been turned over or have
5 inadvertently been forgotten in the process.

6 And we would like to have them, especially since
7 FLSA jurisdiction is at issue.

8 THE COURT: Okay.

9 MR. MIZRAHI: If I may, Your Honor. Just to give
10 you a brief background of this case.

11 This is a Fair Labor Standards Act claim of New York
12 Labor Law claims. The fact pattern of this case indicates
13 that we're dealing with a janitorial exemption.

14 The plaintiff provided superintendent and janitorial
15 services for a residential building in Queens. So the
16 threshold issue in this case is whether or not an exemption
17 applies. And if it does, how it applies.

18 So the facts and the fact discovery in this case is
19 going to be dealing with whether or not the threshold --
20 whether there's jurisdictional -- the jurisdictional component
21 is satisfied.

22 In the very beginning of this case we provided over
23 a hundred or 200 documents that were in our possession.
24 Documents relating to the -- whatever the initial disclosures
25 that would go to the facts and defenses of this case.

1 Most recently, there was a civil case conference
2 before Your Honor in February. During that case conference we
3 had a signed a confidentiality order, after which point we had
4 submitted tax returns to opposing counsel.

5 Soon thereafter we had reached out to our client to
6 tell him that he needed to get into contact with his bank, who
7 had access to the other financial information that was being
8 requested.

9 None of the payroll records were in our client's
10 possession. These are old records. They were in the
11 possession of a third-party bank. We had had to go through
12 the formalities of making the requests to receive them Friday.

13 Last Friday I received copies of these payroll
14 records. I looked over them briefly on Friday and over the
15 weekend. They cover most of the relevant period.

16 I'm prepared to turn them over as soon as we mark
17 any sensitive or confidential information that needs to be
18 marked, and we have no objections to whatever the -- you know,
19 this isn't a case where we're withholding anything.

20 We've been providing everything that's been in our
21 possession, and during the discovery phases we've made it
22 known that we would be supplementing discovery when needed,
23 whenever we had documents that would come into our possession,
24 which has been the case.

25 THE COURT: Okay. So you've got financial documents

1 now, that you can produce once you, I guess, review it for
2 privilege. What about the tax returns?

3 MR. MIZRAHI: Shortly after the previous civil case
4 comes before Your Honor, we had received tax returns from my
5 client's financial adviser. Until that point, we were
6 disputing the relevancy of the documents. We didn't believe
7 that they were relevant.

8 We had felt producing them after the confidentiality
9 order had been signed and stipulated to. I don't -- it's
10 regarding the outstanding tax returns that are being requested
11 for '14 and '18. I don't believe 2018 had been filed -- has
12 been filed yet, so we -- they don't exist.

13 2014, I -- I need to look back to see why they
14 weren't produced along with '15, and '16, and '17, but my -- I
15 don't believe there should be any relevant period. I feel
16 like -- I feel -- my apologies. I have to look back to see
17 why they weren't produced. They should have been produced
18 with '15, '16, and '17.

19 MR. LEON: Your Honor, if I just may quickly?

20 THE COURT: Uh-huh.

21 MR. LEON: I know we bounced around a couple topics
22 there, but regarding tax returns and even any other financial
23 records or outstanding records, just to be clear, these are
24 records that were requested well over six months ago, and
25 during the last conference I got the impression that Your

1 Honor was a little frustrated at the fact that discovery
2 wasn't moving along a little quicker. And that's why in the
3 letter that we filed with the court prior to that
4 conference --

5 THE COURT: Uh-huh.

6 MR. LEON: -- we made clear, here is some
7 outstanding stuff. If we don't get any closure on it, we
8 intend to move to compel. I don't take any pride and joy in
9 filing these motions or looking to get sanctions, even if that
10 is what we're seeking here today.

11 But the tax returns, to say that we're going to go
12 and find out now if we have them or not, I mean, these are
13 things that if I was in their position I would have known
14 about weeks before -- or days before coming to this
15 conference, not wait.

16 And opposing counsel indicated to me before the
17 start of this conference, including here, I believe the
18 implication is the same, that they -- 2014 may or may not
19 exist. To not know the answer to that question even though
20 they were requested and we made clear in our motion to compel
21 and other papers that we were looking for that, I think it's a
22 little misleading.

23 And as to the employment and payroll records,
24 opposing counsel's boss, Joshua Levin-Epstein, indicated to me
25 on the phone that the reason they hadn't gotten those

1 documents from the bank yet was because his client just
2 remembered that he had those. And just to be clear, my client
3 was paid in cash and check.

4 THE COURT: Uh-huh.

5 MR. LEON: My client does not -- and I'll let
6 defendants find out why during the deposition, but my client
7 does not have any records of checks or any bank statements
8 that would reflect these checks.

9 Those are things to my understanding, the way my
10 online banking system works and I'm sure theirs as well, if
11 you give a check to someone and they deposit it, you still
12 have a record on your online banking. That information could
13 have been accessed six months ago.

14 And there was no objection to providing them. In
15 fact, defendants indicated, we don't have responsive documents
16 up until a couple of weeks ago.

17 So to indicate that they just went through the
18 requests, clearly it wasn't a subpoena, they went through an
19 informal request to get it from the bank, and it appears that
20 they got it very easily, that could have been done many months
21 ago.

22 And so now, with only exactly one month ago that we
23 were here indicating all these issues and promising that we
24 would resolve them, to be back here again saying, again we're
25 going to be supplementing, we're going to be providing this

1 stuff to you, keeps leaving us with the feeling that we're
2 being sandbagged here and that at some point after deposition
3 new documents are going to arise that could have been easily
4 obtained. That is my biggest frustration.

5 As the attorney for my plaintiff, I want to make
6 sure that we are litigating our case without ambush and having
7 proper time to get all the relevant information.

8 And as to the Enterprise coverage, individual
9 coverage, which is more at issue than any other FLSA case I
10 can remember having, to be clear, the sort of documents that
11 defendants claim that they've already provided responsive
12 information to but in fact they haven't, we asked them for
13 records showing rental -- the rental income or checks or money
14 orders, documents that they receive as payments from their
15 tenants.

16 Defendants claim they don't have that or they just
17 haven't provided a single document that -- I find it very hard
18 to believe that if they can find pay -- checks that were
19 issued to my client, they can't find further relevant time
20 period, checks provided to them or money orders provided to
21 them from their tenants, which aren't just residential
22 tenants, they're also commercial tenants that would have
23 provided by check.

24 And just to be clear, I don't like asking for over
25 expansive documents, but the reason why it's at issue here, we

1 believe that Enterprise coverage, yes, there's a requirement
2 of two or more employees. But for individual coverage there
3 is no such requirement.

4 I just have to prove that my employee -- my client
5 was individually engaged in interstate commerce. Part of my
6 argument will be in this case that if there are checks that --
7 excuse me, that I believe they exist and have this content, if
8 they reveal that my client was receiving, processing, dealing
9 with checks that have various bank names on them, money
10 orders, et cetera, I would argue that that in partially or
11 completely subjects the business to interstate commerce and my
12 client, and thus the FLSA jurisdiction.

13 So that's why I'm asking for those records which
14 defense don't claim we're not entitled to. They're simply
15 claiming they don't have, which I find extremely hard to
16 believe, and again, leads us to believe that there's documents
17 that are being withheld.

18 And that also has to do with Enterprise coverage, et
19 cetera. We've asked for I think something as broad as any
20 document showing, disproving, relating to Enterprise
21 individual coverage. Not a single document. Not a single
22 document.

23 And then lastly in conjunction with all this, we ask
24 -- and it's two limited questions, but interrogatories we
25 asked the defendants to indicate something as simple as, how

1 did you pay my client? Was it salary, hour, et cetera? And
2 what did you pay them? What were the exact rates?

3 And the response through the different revised
4 responses have evolved to a generic, we paid him pursuant to
5 the law, pursuant to what the exemption is, that's what -- or
6 pursuant to the janitorial rules. That's what we paid him and
7 we paid for his rent.

8 We believe that I shouldn't -- we shouldn't have to
9 walk through a deposition without knowing something as simple
10 as that when we allege it in the complaint, we've alleged it
11 in the responses to interrogatories of what my client was
12 being paid. We don't think that that should not be provided.

13 And to the extent that any interrogatory responses
14 have to be provided, that there be a verified -- excuse me, a
15 revised verification that was belatedly provided to begin with
16 just a couple weeks ago.

17 And then lastly, we don't have complete information
18 regarding that other individual whose employment status is in
19 dispute. It's a name -- a person by the name of Selso Perez.

20 My understanding is he still lives at the apartment
21 complex owned by the defendant. So there's no reason why we
22 should not have his full contact information, at least his
23 address and his apartment number so we can serve a subpoena on
24 him if we need to. Especially when defendants have indicated
25 to me that they intend to do the same thing. So there's no

1 reason why we shouldn't have his contact information.

2 And in line with that, there's a tax attorney, I
3 believe the last name is -- excuse me, an accountant by the
4 name of Michael Katz, who is the one who finished the tax
5 returns or filed the tax returns on behalf of the defendant.

6 He's now, for the first time six months into this
7 case, being disclosed as a witness who now will supposedly
8 have information regarding the tax returns, but will also give
9 information arguing that my client was the only employee that
10 the defendant had throughout their lawsuit.

11 Yet again, something belatedly provided to us;
12 something that there's no excuse as to why it should not have
13 been provided in initial disclosures.

14 And this again is the reason why we believe that
15 being here today, having to write that motion, having to come
16 here today, having to, I'm sorry, hound the defense for
17 responses is the reason why all these fees and costs that we
18 had to -- that we had to invest into this process was
19 completely unnecessary.

20 And I know from my end, because I like the defense,
21 the firm in particular, I gave them so many opportunities to
22 try and resolve it and they didn't.

23 So I believe that these responses should be
24 compelled without objections, and that they should be forced
25 to pay us -- defense in general should be forced to pay us for

1 the time that we put in.

2 THE COURT: Okay. So what was it -- I'm sorry, I
3 missed -- what was the thing before -- the last thing you
4 mentioned was the contact information. What was the thing
5 before that?

6 MR. LEON: Regarding enterprise coverage and
7 individual coverage, and specifically inclusive in that would
8 be like the request for rental income documents showing the
9 payment from tenants to defendant during the relevant years.

10 THE COURT: Okay. What are the financial records
11 that you say you just received?

12 MR. MIZRAHI: They're copies of checks. So canceled
13 checks that were paid to the plaintiff, and then copies of
14 checks that were also paid to Perez, which is the part-time
15 live-in super.

16 THE COURT: Okay.

17 MR. MIZRAHI: Who currently works at the premises.

18 THE COURT: But it's not the financial information
19 they're asking for in terms of checks from other tenants?

20 MR. MIZRAHI: No, for sure not. Those documents
21 were also requested but -- but no, those are not the documents
22 that would be responsive to the financial request. Request
23 for financial records, excuse me.

24 THE COURT: Okay. So what about the checks and
25 other payments made by tenants?

1 MR. LEON: The tax returns covers all the income
2 from the business received during around that period. There
3 is a question about enterprise --

4 THE COURT: Technically the tax returns cover the
5 income claimed by the company, not necessarily all the income
6 that was actually paid.

7 MR. LEON: We believe that's the best and most
8 accurate representation of the business's financial history,
9 and the case law in these kinds of cases support that.

10 Courts look to tax returns and if there are any red
11 flags or glaring issues with those tax returns then we need to
12 look -- delve deeper into, you know, these specific checks.

13 But what plaintiff is asking for is check history
14 from tenants to a residential building over six years. To my
15 knowledge and understanding, it's a small building. They were
16 paying in cash, some were paying in check.

17 MR. MIZRAHI: And money, right?

18 MR. LEON: I think that we need to look to see the
19 tax returns, and I think the tax returns here are straight
20 forward. I think the reason why we entered into a
21 confidentiality order is to -- is to prove all tax returns
22 that we have that were in our possession.

23 MR. MIZRAHI: To be clear with --

24 MR. LEON: To show that there is -- what the
25 financial status of this defendant looks like. We don't have

1 these -- it's not a business. It's not the kind of structured
2 enterprise that has records in their possession of these
3 rental statements that they're asking for.

4 It could be any -- it could be any form. We have
5 payroll documents showing or relating to rent receipts. That
6 can be a deposited -- my client who did pick up the checks
7 said they were -- some paid in cash. Most paid in check.
8 Others paid in money order.

9 There's no way that they can have a paper trail for
10 payments made to plaintiff years ago, but they can't find
11 rental income during the same time period.

12 MR. MIZRAHI: There is --

13 MR. LEON: It's just -- and just one more thing for
14 context. For the tax returns that were finally given recently
15 after confidentiality order was signed, I remember and you
16 please correct me if I'm wrong, but this is my recollection.

17 You told me the tax returns wouldn't have anything
18 that would be responsive of the \$500,000 threshold issue or
19 the information I needed to prove my case.

20 And when I look at those tax returns, part of the
21 information reveals that at least for some of the time the
22 rental -- the gross rental income was over \$500,000. And
23 so --

24 THE COURT: So why do we need anything more? Isn't
25 that a --

1 MR. LEON: Well, the reason we need -- the reason we
2 need --

3 THE COURT: Why are you still contesting
4 jurisdiction then?

5 MR. LEON: Well, one -- well, exactly, Your Honor.
6 But there's another aspect to that.

7 One, their firm said that there may be some
8 conflation of rental income there and it might not be what it
9 actually says.

10 And then lastly, they're not -- even if they didn't
11 contest the \$500,000 threshold issue, they're still contesting
12 the other aspect of enterprise coverage, which would be
13 interstate commerce -- well, excuse me. Interstate commerce.
14 They're contesting that.

15 So if my client was in fact collecting those checks,
16 I believe he's directly involved in interstate commerce,
17 including all the other stuff that he was doing, putting in
18 orders, et cetera, blah, blah, blah. But none of that
19 information has been received.

20 So as a whole, defendants don't want to provide
21 certain documents because they think that the tax returns are
22 all inclusive. But at the same time, maintain all their
23 defenses.

24 And something that's been a trend in this case is
25 that every time I've been told there's nothing more or this

1 won't have any responsive information, one, I get documents
2 after the fact. And two, they're documents that show that
3 there may be other stuff out there.

4 So we're kind of stuck in this situation where we
5 are prejudiced in proving our case because they have all the
6 records and we don't have them. I don't know who to subpoena
7 if they don't have it and they don't want to give it to me and
8 someone else has it. I don't have any of that information.

9 THE COURT: Okay.

10 MR. LEON: Oh, I'm sorry, one last thing. Regarding
11 those payroll records from the bank, one, there hasn't been a
12 single objection throughout this case that those records had
13 to be provided and it doesn't sound like despite some things
14 to the contrary being said here today, it doesn't sound like
15 overall that's their position that they don't have to give it,
16 but my client is entitled to see those pay records,
17 especially when defendant's counsel's boss told me that the
18 reason he had been ambiguous in responding to interrogatories
19 this last time around was because he wanted to get those pay
20 records from the bank to confirm that that information was
21 correct before making any representations.

22 So to say that those records aren't relevant when
23 they're influencing how those responses are going to be
24 issued --

25 THE COURT: Well, I think we're talking about two

1 different sets of records. You're talking about the payroll
2 records or the payments made to your client. That's separate
3 from the financial records that are, you know, essentially
4 income from the -- you know, the rental income.

5 MR. LEON: That's correct, Your Honor.

6 THE COURT: I don't hear any objection from the
7 defendants about producing the first part, which is the
8 financial records pertaining to your client and payments made
9 to your client and the other employee/independent contractor,
10 whatever he is.

11 MR. MIZRAHI: That's accurate, Your Honor. All the
12 documents that were responsive that we had in our possession
13 we produced.

14 THE COURT: Uh-huh.

15 MR. MIZRAHI: Whatever documents that we didn't have
16 in our possession we were working to get. These specific
17 records that they're requesting, they should be in possession
18 of. If he was issued checks, he should have access to those
19 checks just as easily as we would.

20 We had asked for those documents --

21 THE COURT: Maybe yes, maybe no. Not everybody
22 keeps their payroll checks.

23 MR. MIZRAHI: You're right. Not everybody keeps
24 their payroll checks, but he would have the same effort -- he
25 would be able to make the same effort to work and get them

1 just as we would. And we had made the same requests in our
2 document requests and they hadn't been produced.

3 MR. LEON: And I honestly responded that we don't --

4 THE COURT: I'm sorry, but if you're actually
5 employing somebody and paying them, you're required by the law
6 to keep those records. The employee is not. So there's no
7 reason why you would expect him to have the same access to
8 those records as you.

9 MR. LEON: He doesn't have them. That's the clear
10 response.

11 MR. MIZRAHI: Our position is, is that we -- they
12 were not in our possession. We had to make -- go through
13 formal banking procedures to go through the requests to obtain
14 them from the bank, and as soon as they were in our possession
15 we're prepared to make a disclosure.

16 MR. LEON: Could I just ask one question, and this
17 is just for my understanding because maybe I'm talking and
18 going on and on for nothing.

19 Was this a request that was recently made to the
20 bank or was this made months ago? When was it first
21 requested, because that to me is the big difference? If you
22 made the request after I filed the motion to compel then I
23 think that should influence any decision on that, but you
24 know, that's just me and I'll leave it at that.

25 THE COURT: How did you get these records from the

1 bank?

2 MR. MIZRAHI: My client had to call his banking
3 professional. The banking professional had to go through
4 their own internal procedures and processes to pull digital
5 copies that are scanned once checks are deposited through
6 ATMs, limit the search query to the relevant period to get
7 these two sets that they are requesting, issue copies, and
8 then send it to my client who then had to go and bring those
9 copies to my office.

10 THE COURT: And how long that is --

11 MR. MIZRAHI: These aren't copies that are in his
12 possession. These aren't records that he has access to that
13 he can go and get himself. He has to request them from the
14 bank, the bank has to provide them to them. It's --

15 THE COURT: Okay, look, as a technical matter your
16 client doesn't have physical custody of the records, but
17 they're his records and at his request the bank has to give it
18 to him.

19 So technically I think they are under his custody
20 and control, as opposed to plaintiff who can't get those
21 records even with a subpoena because there's private financial
22 information.

23 So you either need to get the records or you need to
24 give them a waiver that would allow them to get the records
25 themselves if they choose to do that.

1 I don't particularly care which way you go but you
2 have to do one or the other because right now you're the only
3 ones that can get access to those records.

4 MR. MIZRAHI: We understand, Your Honor. And again
5 once -- I just received them. I'm looking over them over the
6 weekend. I'm prepared to provide -- to give them over --

7 THE COURT: Uh-huh.

8 MR. MIZRAHI: -- as soon as I mark any information
9 that needs to be marked as confidential. This isn't a case
10 where we're withholding anything. As soon as I receive them,
11 I'm prepared to turn them over.

12 THE COURT: But the other financial records they're
13 asking for in terms of rental income is important if you're
14 contesting, you know, FLSA jurisdiction on that basis.
15 Especially if you've got a case where the tax records show,
16 you know, income that's at or close to that threshold.

17 MR. MIZRAHI: We, as an initial matter, would like
18 to object to opposing counsel's characterization of the
19 procedural posture related to the discovery of this case. I
20 know that there was a long soliloquy and there are some issues
21 regarding accuracy of his description of our position.

22 So with regard to the financial records I'm going to
23 enter them as coverage threshold. What he's requesting is
24 every single document related to enterprise coverage
25 liability. But sitting down here today I think he's asking

1 that he needs to establish whether or not his plaintiff was
2 engaged in interstate commerce.

3 THE COURT: Uh-huh.

4 MR. MIZRAHI: I think the more reasonable thing to
5 do here is provide a sample set of one or two types of
6 documents that can answer his question yes or no. I think
7 what he's asking for is over-broad, it's unrelated to the
8 issue he's trying to identify, and I think that it can easily
9 be answered in a deposition.

10 He has not been pushing forward to depose my client
11 and even though deposition notices had been taking, they've
12 been passed. They hadn't been followed.

13 We think that if he has any -- if he'd like to see
14 representative samples of checks that he believes qualifies
15 being engaged in interstate commerce, I can get you know,
16 sample selections of those checks. But what he's asking for
17 is over-broad and I don't think it's narrowly tailored to the
18 information that he's seeking.

19 MR. LEON: I did provide --

20 THE COURT: What is the theory that you have, that
21 if he --

22 MR. LEON: The --

23 THE COURT: He's collecting these rent checks.

24 MR. LEON: Right. Collecting rent.

25 THE COURT: And the theory is what? That if any of

1 those rent checks are from an out-of-state bank that somehow
2 makes it interstate commerce?

3 MR. LEON: Right. My understanding is that the
4 checks come from various banks, that he would also collect
5 money orders.

6 And I believe that along with just his actual
7 functions at the job in terms of making delivery -- excuse me,
8 putting in orders from out of state, that at least there's a
9 colorful argument, and I believe that's enough to at least
10 beat a summary -- motion for summary judgment and get FLSA
11 jurisdiction in this case, because if they're right on the
12 other individual working or performing services for the
13 building not being an employee, that is the other argument I -
14 - the other back up I have to make.

15 THE COURT: Okay. I'm not saying whether I agree
16 with your theory or not, but I do think that a sample of the
17 checks and money orders would accomplish what you need to you
18 know, move forward with that theory. It doesn't sound to me
19 like they're contesting the factual basis of your theory, just
20 the actual theory itself.

21 MR. LEON: If I could just make one quick note,
22 because I don't want to lose sight of the one particular
23 point? Yes, there was a general request that said documents
24 proving, showing, relating to interstate commerce, individual
25 commerce --

1 THE COURT: Uh-huh.

2 MR. LEON: Excuse me. There was also a specific
3 request for the relevant years.

4 THE COURT: Uh-huh.

5 MR. LEON: Rent received from defendant -- from --
6 that defendant received from his tenants which presumably my
7 client was picking up and dealing with that entire time
8 because he was the one in charge of collecting that.

9 THE COURT: Uh-huh.

10 MR. LEON: So we did narrowly tailor that. And
11 there were responses saying, look at what we provided you
12 with. It's like 200 documents, none of which are responsive,
13 without ever indicating that they were withholding documents
14 as they clearly are.

15 So obviously we'll defer to whatever the Court is
16 going to decide, but the fact that these responses have been
17 issued this way for six months now, I believe that defendants
18 should have to give more than just sample, but give at least
19 the relevant FLSA period for that period of time, the rent
20 received from their tenants during that time period.

21 I'm not asking for the full six years. I'm asking
22 for the relevant three years that I need to prove my FLSA
23 case. I believe if they had -- if they had said to me, we're
24 willing to give you a sample two or three months ago, we might
25 have resolved this.

1 But now, after we file a motion, now it's a sample
2 would be good and we should be rewarded for not having given
3 you everything or giving you a legitimate objection before.
4 That's the concern that we have.

5 THE COURT: Okay. Your client doesn't keep any
6 records of any of this stuff?

7 MR. MIZRAHI: This is a -- this is --

8 THE COURT: These are just bank records that
9 basically you're going back to piece together?

10 MR. MIZRAHI: This is a case where we're dealing
11 with an individual who owns, I believe it's a seven or an
12 eight-unit apartment complex in Jackson Heights Courts.

13 MR. LEON: Thirty-three.

14 MR. MIZRAHI: Thank you. It's an unsophisticated
15 landlord. He works for the Department of Education. It's not
16 an enterprise that has any formal bookkeeping or procedures.
17 It's the most basic sort of record keeping that you can have.

18 So we've made it abundantly clear to my client that
19 he needs to produce relevant documents that are in his
20 possession, and we've -- he knows that he needs to produce
21 documents that he has.

22 And we've made it clear to opposing counsel that
23 anything that we haven't produced that we need to that we're
24 in possession of and that we're making sure our client is
25 giving us, supplementing on an immediate basis.

1 So this isn't a case where we're withholding
2 anything that we were previously not in possession of. Or,
3 I'm sorry, that we were withholding anything that were in
4 possession of previously, but the characterization of why
5 we're objecting to these objections is inaccurate, and the
6 requests themselves are incredibly broad.

7 So to be able to make requests for all documents
8 relating to interstate coverage, or all documents relating to
9 rent received, when he has answers to those questions in the
10 form of tax returns, in the form of other documents that have
11 been produced in the very beginning of this case, it's hard to
12 substantiate a claim for prejudice. It's hard to substantiate
13 a claim that he's unable to have been prosecuting this case
14 accordingly.

15 We believe that information that he's seeking can be
16 obtained through other means that are not as burdensome and
17 are not as over-broad. And if he's -- when we have been
18 producing documents it's been when he's able to identify
19 specific selections that we're able to produce.

20 MR. LEON: That's not correct.

21 MR. MIZRAHI: It's not the case that we're not
22 producing anything and we're not ready to move forward. We --

23 MR. LEON: The request never changed. I'm sorry to
24 interrupt. The request never changed. The apartment complex,
25 according to my client, is in excess of 30 apartments.

1 To say that it's a seven -- seven resident or seven
2 apartments, that's just not -- I guess that's something else I
3 have to look into for a deposition, but this is information --
4 the request had never been narrowly tailored. I have -- it
5 had never been further narrowly tailored.

6 We've had requests and we said, you owe us this.
7 Oh, okay, okay, we'll get it to you. A week or two weeks
8 later I get it and I say, it's still deficient, get it to me.
9 Okay, okay. There's never been a, we narrow it to this
10 particular time period.

11 But for now, for the purposes of resolving this, the
12 rental income thing we'll -- right now I think it says for the
13 entire time my client worked there, which is like 2009 to the
14 present. Fine. We'll narrow it to the FLSA period. The
15 relevant -- which I believe is 2014 to 2017.

16 And just to further hit one point home, the tax
17 returns don't have copies of a single check. They don't
18 indicate what banks they came from. They don't indicate where
19 the money orders came from.

20 There is no other way aside from viewing those
21 checks that we can actually make out where those things are
22 coming from, where they're going to, what their role in
23 interstate commerce would be. So there's actually a huge
24 prejudice.

25 There's no other way that we can get those

1 particular records, and I'm positive that if -- well, I'm sure
2 defendants have some paper trail of those records. And when I
3 do a deposition of defendant, he's -- I mean, I believe he's
4 going to tell me that he did at some point in time deposit a
5 rental check.

6 And so what, we're going to say he doesn't have it,
7 or he just hasn't been willing to provide it up until this
8 point? I think we should get those relevant FLSA periods
9 because their objections -- the objection that they're voicing
10 right now, which they have not voiced three months ago, four
11 months ago, I believe the issue would be waived, just because
12 of the time that we've had to wait.

13 If they would have told me this, I would have worked
14 with them. But they're saying it now, after I've invested all
15 this time and after I sincerely distrust the sample that I
16 would be getting.

17 THE COURT: All right. So, I think you're going to
18 have to request from the bank checks or money orders deposited
19 during the period 2014 to 2017, and then you know, you can go
20 through them and take out anything that's not rental income.

21 You know, if you -- you know, obviously -- I assume
22 it's a business account, but maybe not. But if you deposited
23 things that were something other than rental income you can
24 take those out before you produce it.

25 MR. LEON: That's for me, Your Honor, correct?

1 THE COURT: Uh-huh.

2 MR. LEON: I would just ask that defense could give
3 me any identifying information that I need so that I know what
4 bank or what account to subpoena.

5 THE COURT: No, no, no, they're going to give you --

6 MR. LEON: Oh, I'm sorry.

7 THE COURT: They're going to get the records from
8 the bank --

9 MR. LEON: Oh, I'm sorry, Your Honor. I
10 misunderstood.

11 THE COURT: -- and give them to you. Yeah.

12 So you'll get the, you know, the records of the
13 deposited checks or money orders.

14 MR. MIZRAHI: Respectfully, Your Honor. Again, I
15 think the basis of the request is to establish whether or not
16 the plaintiff was engaged in interstate commerce. Is that
17 accurate?

18 MR. LEON: That is a legal theory. Yeah.

19 MR. MIZRAHI: If that's the basis for the request
20 wouldn't it be more resource effective and more time effective
21 for all parties if we provide a limited set rather than
22 records that are requesting over the span of three years, that
23 can answer that question one way or another?

24 MR. LEON: I would just respond -- say -- refer you
25 back to everything I said for the past five minutes and why I

1 have an issue with that.

2 THE COURT: I mean, are you -- are you -- I mean
3 look, you have all these records, or your client should know.
4 I mean, you understand what their legal theory is. If you
5 concede the point, then this is an exercise in mootness.

6 MR. LEON: I don't answer it if you conceded that,
7 absolutely.

8 MR. MIZRAHI: I don't believe that they're relevant
9 to show engaging in interstate commerce. I think that you
10 need to establish whether the individual themselves was
11 proactively taking steps to facilitate transactions over state
12 lines.

13 And what he's asking for are copies of checks that
14 have names of banks that do business out of state. I don't
15 think those two things are the same.

16 MR. LEON: And I didn't ask for checks that have
17 names with banks out of state. I said I believe those checks
18 will have names of banks that are from out of state. The
19 request was sufficiently broad, but enough -- with enough
20 specificity to prove the claim.

21 I'm asking for all checks, all the --

22 MR. MIZRAHI: But how did he handle those checks?

23 MR. LEON: -- all proof of rental income or receipt
24 of rent from the defendants during the relevant years.

25 THE COURT: Again, I don't think there's a factual

1 dispute here. There is no -- look, your client received
2 rental checks or money orders from people and either deposited
3 them himself or, you know, gave them to the owner to deposit
4 them.

5 MR. LEON: That's correct.

6 THE COURT: Right?

7 MR. MIZRAHI: His client would go door to door,
8 collect checks --

9 THE COURT: Yeah.

10 MR. MIZRAHI: -- and then give them to landlord to
11 deposit.

12 THE COURT: And the landlord would deposit them.
13 Okay.

14 MR. MIZRAHI: This is his -- that's not engaging in
15 interstate commerce.

16 THE COURT: Okay.

17 MR. MIZRAHI: I don't think there's any case law
18 that supports that collecting --

19 THE COURT: But that's my point.

20 MR. MIZRAHI: -- checks is --

21 THE COURT: If the only objection you have is to the
22 legal theory then why don't you just concede what he's saying?

23 MR. MIZRAHI: We're just asking that we limit it so
24 we don't have to make requests for three years from a bank
25 that's going to take at least 30 -- 25 days to give us three

1 years that we have to then go back and pull for each specific
2 production that they give for each month that only limit it to
3 the set. I'm asking that we give you a sample set that can
4 answer your question objectively --

5 MR. LEON: I'd rather wait for --

6 MR. MIZRAHI: -- one way or another.

7 MR. LEON: I'd rather wait 30 days to get what's
8 responsive, rather than be here in 45 days disputing that the
9 sample is not accurate or complete, which in light of the
10 history of this case I would have already reasonably walking
11 in that there might not be complete information.

12 And I would absolutely compare it to the tax returns
13 and if there is a discrepancy, which with all due respect I
14 believe there will be, then I'll be back here saying I don't
15 believe it's complete, Your Honor, we should be entitled to
16 look at all of it, and then we're wasting twice the time.

17 THE COURT: Look, just ask the bank for the records.
18 It's just that it's the checks and money orders deposited
19 during 2014 and 2017. It will take the bank as long as it
20 takes the bank to get it.

21 MR. LEON: 2015 to 2017, Your Honor.

22 THE COURT: I'm sorry, 2015 and 2017.

23 MR. MIZRAHI: Yes, Your Honor.

24 THE COURT: You know, like I said, if you're willing
25 to stipulate that you know, his client handled checks from out

1 of state banks or whatever it is you're hoping to find, then I
2 think you can dispense with all of this stuff.

3 But if you're not going to stipulate to it then I
4 think he's entitled to the information, even if, you know,
5 it's an unproven legal theory.

6 At the end of the day you can argue the legal theory
7 without fighting over the factual situation if there's nothing
8 to fight over. But I don't know what's in those records. You
9 do, or your client does.

10 MR. MIZRAHI: Yes, Your Honor.

11 THE COURT: So either produce the records or give
12 them the stipulation.

13 All right. So what date can we produce this stuff?

14 MR. MIZRAHI: We're going to make the request and
15 we're going to produce them as soon as they're in our
16 possession. I'd say that we need at least 30 days from the
17 bank. We're going to obviously request them on an expedited
18 basis, but I think 30 days should be sufficient.

19 THE COURT: All right. So I'll give you to May 3rd.
20 The current discovery deadlines?

21 MR. LEON: I believe it's a month from this week,
22 Your Honor.

23 THE COURT: Yeah, it's April 26th. So assuming you
24 got these records by May 3rd and you still have to
25 depositions, so how much longer do we need for discovery?

1 MR. LEON: I don't know, Your Honor, because there's
2 also the other two witnesses. I now want to depose the
3 accountant for the defendant that was recently disclosed --

4 THE COURT: Okay. Well, they're giving you their
5 contact information for those two.

6 MR. MIZRAHI: He has the contact information
7 already, Your Honor.

8 MR. LEON: I'm sorry --

9 THE COURT: About those witnesses?

10 MR. LEON: -- for Selso Perez, I definitely don't
11 have his. Like full contact information.

12 MR. MIZRAHI: Did you not call him last week?

13 MR. LEON: I don't have his information.

14 MR. MIZRAHI: Did anyone from your office call him
15 last --

16 MR. LEON: I don't have it.

17 MR. MIZRAHI: -- week?

18 MR. LEON: I don't have his address where I can
19 serve him with a subpoena. Do you? He lives in your
20 client's --

21 MR. MIZRAHI: We can give him -- we can give the
22 information if it already hasn't been provided, Your Honor.
23 That's fine.

24 THE COURT: Whatever you have, give him the contact
25 information for those two witnesses.

1 MR. MIZRAHI: That's -- yes, Your Honor.

2 MR. LEON: Thank you, Jason.

3 THE COURT: I mean, if he's going to have to
4 subpoena him, you've got to give him the address.

5 MR. MIZRAHI: Yes, Your Honor.

6 THE COURT: So how many depositions are we talking
7 about total?

8 MR. LEON: From plaintiff's side, two to three.

9 THE COURT: Okay. How much longer do you need?

10 MR. LEON: Assuming that we get the records within -
11 - by May 3rd and we can review it, I'd say probably another
12 three months, just because I'm coordinating with other
13 people's schedules that aren't apparently under the
14 defendant's counsel's authority or command, so I don't know
15 what their schedules are going to look like.

16 THE COURT: So August?

17 MR. MIZRAHI: That's fine, Your Honor.

18 THE COURT: August 2nd? That's a little more than
19 three months.

20 All right. So deadline for completion of discovery
21 is August 2nd, deadline for beginning dispositive motion
22 practice will be September 2nd, and do we want to schedule a
23 settlement conference at some point?

24 MR. LEON: I think we should wait until after this
25 part has been moved along a little bit and we're confident

1 that -- as soon as we have all the records and we believe we
2 know what we need to know.

3 THE COURT: Uh-huh.

4 MR. LEON: I'm always happy to having the settlement
5 discussion despite whatever may have happened in the case.

6 THE COURT: All right. Why don't you go forward
7 then with discovery, and you'll let me know when it would be
8 productive to have a settlement conference?

9 MR. MIZRAHI: We would like -- we welcome the
10 opportunity to have a settlement conference that's presided
11 over by a magistrate judge. Either yourself or another
12 magistrate -- or a magistrate judge.

13 THE COURT: I leave it up to you. I can schedule
14 something tentatively now if you want.

15 MR. MIZRAHI: I think that would be a good idea, if
16 we have a -- just the holding date. Then we would be able to
17 use that as a --

18 THE COURT: How about July?

19 MR. LEON: I don't mean to be the naysayer on all
20 these issues, but I'd rather wait until we're kind of more
21 along with the depositions and all that because --

22 THE COURT: Okay.

23 MR. LEON: -- I don't know if we're actually going
24 to be there.

25 THE COURT: All right.

1 MR. LEON: I'd rather be there and then let the
2 Court know.

3 THE COURT: That's fine.

4 MR. LEON: And obviously our preference would be,
5 Your Honor, as I like to tell my colleagues, my favorite Judge
6 Tiscione story is Your Honor taking an iPad out to do legal
7 research while the attorneys are disputing the legal issue.
8 So I'm definitely very partial.

9 Your Honor, if I could just get clarification on two
10 of the issues that we discussed earlier in terms --

11 THE COURT: Sure.

12 MR. LEON: -- of what the Court's ruling or decision
13 is on it?

14 In terms of all the responses, in response to
15 document requests from defense, their latest revisions, I
16 think the third, where they object and without waiving those
17 objections, and pursuant to those objections, respond
18 providing documents but without indicating whether they're
19 withholding documents. They need to revise those to indicate
20 whether they're withholding documents.

21 THE COURT: Yeah, I think they said they were not,
22 so they just need to -- when they submit the other responses
23 they can just make it clear that they're not withholding any
24 documents.

25 MR. LEON: And then -- well, actually and -- sorry.

1 And in along those lines with interrogatories, when we're
2 asking about salary and just something that is specific.

3 My understanding is that my client was paid pretty
4 much the same every single week, but I just want to make sure
5 that I understand what defendant's position is on what they
6 paid him.

7 And again, especially if they're going to have
8 records of what they paid him to be able to say here is what
9 we paid him and for what periods of time.

10 THE COURT: Well, I think you're giving him the
11 payroll records, right?

12 MR. MIZRAHI: We're going to give him payroll
13 records. It's going to answer the question. We've already
14 answered the question. Payroll records are going to answer
15 the question conclusively, so he has it in front of them.

16 MR. LEON: Well, so here's the reason why I would
17 disagree with that, because even by their own responses they
18 said they paid my client in cash and check.

19 THE COURT: Yeah, so the checks aren't going to have
20 everything.

21 MR. LEON: Right. So for that reason, I can't just
22 rely on the record.

23 THE COURT: I don't think it's too much to ask for
24 you to tell him how much you paid his client.

25 MR. MIZRAHI: We -- the cash amount and the check

1 amount I think were the same. I think he would cash the
2 checks, or the checks that were -- he received the check, I
3 believed for \$300 per week.

4 The check was either cashed, so the cash deposit
5 which he'd then withdraw, or they were canceled and then he
6 paid him in cash. There wasn't -- it's not the case that it
7 was a split amount, but we'll produce it.

8 MR. LEON: So --

9 THE COURT: I think it's very simple.

10 MR. MIZRAHI: Yeah.

11 THE COURT: Just give him an actual physical amount
12 instead of saying --

13 MR. MIZRAHI: Sure. Sure.

14 THE COURT: -- referencing everything else. I mean,
15 if you paid him \$300 a week, or \$600 a week, or whatever it
16 is, just say that.

17 MR. MIZRAHI: I believe it's in the responses
18 already but we'll -- I believe it's in the responses already
19 but we'll answer it happily. That's fine.

20 THE COURT: Just answer it.

21 MR. MIZRAHI: Sure.

22 MR. LEON: Just one thing. And we would just ask
23 for --

24 THE COURT: Just a number.

25 MR. LEON: -- a revised verification with that.

1 That's it.

2 MR. MIZRAHI: Sure.

3 THE COURT: Yeah, he's going to have to do that
4 anyway for all the new stuff.

5 All right. You'll let me know when you want to come
6 in for a settlement conference.

7 MR. LEON: And, Your Honor, I would be remiss and
8 unfortunately I have to bring the issue up again and I'll
9 obviously defer to the Court's discretion and better judgment
10 on it, but our request for fees and costs for having to be
11 here and writing this motion and having this 45-minute long
12 conference on issues that the parties could have and should
13 have resolved among themselves, but because of what we would
14 call willful noncompliance we were forced to do and partake
15 in --

16 THE COURT: I don't know that I would go as far as
17 saying willful noncompliance, but I definitely don't want this
18 dragging on anymore.

19 I'm not imposing sanctions right now, but if you
20 don't meet the May 3rd deadline that's going to change. And
21 the next time there's an issue I strongly suggest the parties
22 pick up the phone and talk to each other because a lot of this
23 stuff is really not something that should require this much
24 time to resolve.

25 All right. Good luck.

1 MR. LEON: Thank you, Your Honor.

2 MR. MIZRAHI: Thank you, Your Honor.

3 (Proceedings concluded at 11:31 a.m.)

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6 I, CHRISTINE FIORE, Certified Electronic Court Reporter and
7 Transcriber, certify that the foregoing is a correct
8 transcript from the official electronic sound recording of the
9 proceedings in the above-entitled matter.

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Christine Fiore

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May 15, 2019

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Christine Fiore, CERT

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